IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 11 OF 2005

Javed A. Bhat,
Presently lodged in
Central Jail-Aguada,
Sinquerim, Bardez,
Goa. ... Appellant

versus

Union of India,
through Shri M. P. Vaz,
Superintendent of Central
Excise, Anti-Smuggling Unit,
Margao, Goa. ... Respondent

Mr. J. P. D'Souza, Advocate for the Appellant.

Mr. J. Vaz, Special Public Prosecutor for the Respondent.

CORAM : N. A. BRITTO, J.

DATE : 9TH NOVEMBER, 2006.

ORAL JUDGMENT

Heard Mr. J. P. D'Souza, the learned Counsel on

behalf of the accused and the learned Special Public Prosecutor Mr. J. Vaz on behalf of the respondent.

2. The accused was charged and tried with the allegation that on 14-1-2003 at about 11.00 hours he was found in possession of certain drugs/psychotropic substances. He was charged under Section 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985(Act, for short) with the allegation that he was found in possession of 380 gms. of hashish/charas; under Section 20(b)(ii)(A) with the allegation that he was found in possession of 85 gms. of ganja; under Section 21(b) with the allegation that he was found in possession of 37 gms. of brown sugar/heroin; under Section 22 (b) with the allegation that he was found in possession of 8.4 gms. of ecstasy tablets and again under Section 21(b) with the allegation that he was found in possession of 6 gms. of cocaine.

3. After the trial was concluded the accused was convicted and sentenced as follows:-

> "Under Section 20(b)(ii)(B)(for possession of charas) to

undergo R.I. for three years and fine of Rs.50,000/-, in default to undergo R.I. for six months".

4. The learned trial Court found that the quantities of heroin, cocaine and ecstasy were small quantities and convicted and sentenced the accused under Sections 21(b) and 22(b) of the Act to undergo three months R.I. and fine of Rs.1000/- and Rs.10,000/- each. The learned trial Court also found that the quantity of ganja found was small quantity and convicted and sentenced the accused under Section 20(b)(ii)(A) to undergo R.I. for three months and to pay a fine of Rs.10,000/-, in default one month R.I. The learned trial Court also ordered the sentences to run concurrently.

5. There is no dispute that the accused was in detention during the course of the trial over two years i.e. from 14-1-2003 to 20-3-2005.

6. Although the appeal was filed against the conviction and sentences imposed upon the accused by the learned Special Judge, N.D.P.S. Court, Mapusa dated 30-3-2005, the learned

Counsel on behalf of the appellant/accused has restricted his arguments on the point of sentence i.e. to say in relation to Section 20(b)(ii)(B) of the Act.

7. As per the case of the prosecution, the said charas/hashish were found in the form of cigars and flats, presumably meaning thereby they were in the form of cigarettes and flat substances. The panchanama nor the evidence shows as to how many such substances in the shape of cigarettes or flat substances were found in the transparent polythene bag which when weighed was found to be 380 gms. As per the prosecution, two representative samples of 50 gms. each were taken from the said polythene bag and put into two separate polythene bags and heat sealed and one of such sample was sent for analysis. The evidence of Mahesh Kaissare/PW1 who had tested one of the said representative sample shows that on 6-2-2003 he found in the polythene bag sent to him a dark brown substance in the form of cylindrical sticks and flat squarish pieces and the total weight of the substance along with the polythene bag was found to be 50 gms. The evidence further shows that Kaissare/PW1 took about 5 gms. of the said substance as representative sample and after

analysis came to the conclusion that the substance analyzed by him contained charas. There is no dispute that 100 gms. have been declared to be small quantity for which punishment provided is for a term which may extend to six months or with fine which may extend to Rs.10,000/- or with both.

8. Relying on the decision of the Apex Court in **Mr. Gaunter Edwin Kircher** v. **State of Goa**(1993(1) Crimes 1183) the learned Counsel contends that since only 50 gms. was sent for analysis, the accused could not have been convicted for possession of variable quantity under Section 29(b)(ii)(B) of the Act. The learned Counsel further submits that if the prosecution wished to prosecute the accused for possession of variable quantity i.e. 380 gms. of charas then the entire quantity of charas ought to have been sent for analysis. The learned Counsel further submits that the prosecution, having not sent the entire quantity i.e. the remaining pieces in the form of cigars or flats, it could not be presumed that they too would contain charas/hashish.

9. In the case of **Mr. Gaunter Edwin Kircher** v. **State of Goa**(supra) the accused was arrested with two pieces of charas weighing 7 gms. and 5 gms. respectively and only one piece was sent for chemical analysis and the said piece which was sent for analysis was found to have been less than 5 gms. Considering the said facts, the Apex Court observed that from the report of the Junior Scientific Officer it could not be presumed or inferred that the substance and the other piece weighing about 7 gms. also contained charas and further observed that it had to be borne in mind that the Act applied to certain narcotic drugs and psychotropic substances and not to all other kind of intoxicating substances and in any event in the absence of positive proof that both the pieces recovered from the accused contained charas only, it would not be safe to hold that 12 gms. of charas were recovered from the accused. The Hon'ble Supreme Court also proceeded to hold that the prosecution had proved positively that charas weighing about 4.57 gms. was recovered from the accused and the failure to send the other piece had given rise to that inference. The Supreme Court also noted that in order to obviate this difficulty, the concerned authorities would do better if they send the entire quantity seized for chemical analysis so

that there may not be any dispute of this nature regarding the quantity seized and if it is not practicable in a given case to send the entire quantity then sufficient quantity by way of samples from each of the packets recovered should be sent for chemical examination under the regular panchanama as per the provisions of law. On behalf of the accused, it is contended that if all 90 gms. of ganja could be sent in this case nothing prevented the prosecution from sending 380 gms. of charas as well.

10. There is no dispute raised, on behalf of the respondent, either on facts reproduced herein above or the law laid down by the Apex Court in the aforesaid case of **Mr. Gaunter Edwin Kircher** v. **State of Goa**(supra).

11. In the case at hand, the prosecution did not send all the pieces either in the form of cigars or flats for analysis but the prosecution remained satisfied only by sending some of such pieces weighing about 50 gms. and therefore applying the principle laid down by the Apex Court it has to be concluded that what the accused was found with, was only 50 gms. of charas/hashish and not the entire quantity of 380 gms. as

contended by the prosecution and that is the inference which has got to be drawn, as drawn by the Apex Court, upon the failure of the prosecution to send all the cigars or flats found with the accused.

12. Once that conclusion is arrived at, it follows therefrom that the accused could not be convicted and sentenced under Section 20(b)(ii)(B) of the Act but had to be convicted and sentenced under Section 20(b)(ii)(A) of the Act for which punishment provided is six months and fine not exceeding Rs.10,000/-. As already stated, the accused has already undergone detention in the course of the trial for over two years. It is submitted on behalf of the accused that in case all the fines are not paid, they would be paid within a period of fifteen days. As far as the fine under Section 20(b)(ii)(A) is concerned the same could not be more than Rs.10,000/- and in case the accused has paid Rs.50,000/- as awarded by the learned Special Judge, the accused would be entitled for refund of the balance. The accused has already undergone detention for a period which is more than the maximum which could be imposed on him.

13. Consequently, the appeal is partly allowed and the conviction and sentence imposed upon the accused by the learned Special Judge is reduced from Section 20(b)(ii)(B) to Section 20(b)(ii)(A) as aforesaid. The other convictions and sentences imposed under other Sections shall remain unaffected. The Bail Bonds of the accused shall stand cancelled. In case the fines are not paid within a period of four weeks the learned Special Judge to take steps to recover the same from the accused, in accordance with law.

N. A. BRITTO, J.

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